75-937

Supreme Court, U. S.
FILED
JAN 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

MORTON-NORWICH PRODUCTS, INC., RICHARDSON-MERRELL, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

COCHRANE & BRESNAHAN
By John A. Cochrane
John E. Thomas
Suite 500
Cochrane & Bresnahan Building
360 Wabasha
Saint Paul, Minnesota 55102
612/298-1950
Attorneys for Petitioners

224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
REFERENCE TO OPINIONS BELOW	2
GROUNDS FOR JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	3
I. Was there a "trial by affidavit", by not allowing Plaintiffs any discovery of the alleged antitrust conspiracy, in violation of the holding of this Court in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), (hereinafter "*Poller*")?	3
II. Did the lower courts' apparent acceptance of the mere termination of the distributorship contract as in itself being conclusive evidence of withdrawal from the conspiracy by Richardson violate the holding of this Court in *Hyde v. U.S.*, 225 U.S. 347, 368-372 (1912), (hereinafter "*Hyde*")?	3
III. Was Rule 56(f) of the Federal Rules of Civil Procedure correctly interpreted and applied where the Circuit Court imposed a "Catch 22" by saying Plaintiffs must *identify* what facts were within Defendants' *exclusive* control and how, if at all, discovery would assist in bringing *those* facts *to light*?	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. The decision herein did not allow Plaintiffs any discovery and is in conflict with the decision of this Court in *Poller*	7

PAGE

II. Conflict between the decision herein and other circuits allowing discovery in applying the policy of *Poller* 11

III. The decision herein ignored the continuing purpose and effect and lack of repudiation of the conspiracy and is in conflict with the decision of this Court in *Hyde* 13

IV. Plaintiffs' Rule 56(f) affidavits were not deficient 15

V. This is a matter of special public importance 17

CONCLUSION 18

ADDENDUM 19

APPENDIX A:
Opinion of Court of Appeals A-1

APPENDIX B:
Denial of Rehearing Petition A-17

APPENDIX C:
Order and Memorandum of District Court A-18

APPENDIX D:
Memorandum Order for Entry of Judgment A-27

APPENDIX E:
Statutes and Rules Involved A-29

APPENDIX F:
Complaint Paragraphs 20, 21 and 22 ..... A-31

APPENDIX G:
Rule 56(f) Affidavit A-33

TABLE OF AUTHORITIES

Cases: PAGE

A.L.W., Inc. v. U.A.L., 510 F. 2d 52 (9th Cir., 1975) 12

Akron Presform Mold Co. v. McNeil Corp., 496 F. 2d 230 (6th Cir., 1974) 16

Anderson v. A.A.A., 454 F. 2d 1240 (9th Cir., 1972) 12

Craig v. Sun Oil, 515 F. 2d 221 (10th Cir., 1975) 12

Diversified Brok. S., Inc. v. Grtr. Des Moines Bd. of Realtors, 521 F. 2d 1343 (8th Cir., 1975) 10

First National Bank v. Cities Service Co., 391 U.S. 253 (1968) 18

Highland Supply Corp. v. Reynolds Metals Co., 327 F. 2d 725 (8th Cir., 1964) 14

Hyde v. U.S., 225 U.S. 347 (1912) 3

Ingalls Iron Works v. Fruehauf Corp., 518 F. 2d 1966 (5th Cir., 1975) Ad-20

Johnson v. RAC Corp., 491 F. 2d 510 (2d Cir., 1974) 11

Modern Home Institute, Inc. v. Hartford Acc. Ind. Co., 513 F.2d 103 (2d Cir., 1975) 11

Parker Dodge v. Chrysler, 1975 Trade Cases, para. 60, 283 (4th Cir., 1975) 11

Pioneer Company, Inc. v. Talon, Inc., 462 F. 2d 1106 (8th Cir., 1972) 14

Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962) 3, 7, 16

Poster Exchange Inc. v. National Screen Service Corp., 517 F. 2d 117 (5th Cir., 1975) 11

	PAGE
Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F. 2d 993 (9th Cir., 1975)	9
School Board of Okaloosa County v. Richardson, 332 F. Supp. 1263 (N.D. Fla. 1971)	15
State of Washington v. American Pipe & Construction Co., 280 F. Supp. 802 (D. Hawaii 1968)	9
Tankersley v. Albright, 514 F. 2d 956 (7th Cir., 1975)	12
Tobelman v. Missouri - Kansas Pipe Line Co., 130 F. 2d 10/6 (3d Cir. 1942)	15
Tyler v. Vickery, 517 F. 2d 1089 (3d Cir., 1975)	15
U.S. v. Cohen, 516 F. 2d 1358 (8th Cir., 1975)	13
U.S. v. Halpern, 260 F. 2d 590 (3d Cir., 1958)	15
Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D. Ga. 1973)	9
Walker Distributing Co. v. Luckey Loger Brewing Co., 323 F. 2d 1 (9th Cir., 1963)	9
Wall Products Co. v. National Gypsum Co., 375 F. Supp. 832 (N.D. Cal. 1973)	8
Warner v. First National Bank of Minneapolis, 236 F. 2d 853 (8th Cir. 1956)	10
Yaffee v. Powers, 454 F. 2d 1362 (1st Cir., 1972)	12
Statutes:	
Sherman Act. Secs. 1 and 2 (15 U.S.C. Sec. 1 and 2)	3
Clayton Act. Sec. 4 (15 U.S.C. Sec. 4)	3
28 U.S.C. Sec. 1337	3
28 U.S.C. Sec. 2106	18
Federal Rules of Civil Procedure:	
Rule 56, subparagraphs (c) and (f)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

MORTON-NORWICH PRODUCTS, INC., RICHARDSON-MERRELL, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners (hereinafter, "Plaintiffs"), petition this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit entered in this case on July 17, 1975, with Petition for Rehearing En Banc denied, without opinion, by Order entered on August 7, 1975, resulting in "trial by affidavit" against Plaintiffs without allowing Plaintiffs any discovery.

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals, dated July 17, 1975, is reported in 520 F. 2d 289 and is reprinted in Appendix A hereto. The Court of Appeals Denial of Rehearing Petition on August 5, 1975, is reprinted in Appendix B hereto. The opinion of the District Court on October 1, 1974, is reported in 1974-2 Trade Cases, para. 75,292 and is reprinted in Appendix C hereto. The District Court certified appeal under 28 U.S.C. section 1292(b) on October 17, 1974, and the Eighth Circuit granted leave on November 21, 1974, to docket the appeal. On December 18, 1975, the District Court, sua sponte, issued a Memorandum Order For Entry of Judgment expressly determining "that there is no just reason for delay" in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This is reprinted in Appendix D hereto.

GROUNDS FOR JURISDICTION

On November 21, 1974, the Eighth Circuit, pursuant to 28 U.S.C. sec. 1292(b), granted Plaintiffs application for leave to take interlocutory appeal, from which the appeal was perfected. The date and time of entry of the judgment of the Court of Appeals is July 17, 1975. The Petition for Rehearing En Banc was denied by Order entered on August 15, 1975.

This Petition is being filed within 90 days inclusive of both tolling, 317 U.S. 264, at 266, and an extension Order dated October 30, 1975, by Mr. Justice Blackmun granting Plaintiffs' application and extending the filing date to and including January 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) for determination and relief as provided in 28 U.S.C., Section 2106.

QUESTIONS PRESENTED FOR REVIEW

1. Was there a "trial by affidavit", by not allowing Plaintiffs any discovery of the alleged antitrust activity, in violation of the holding of this Court in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962), (hereinafter "*Poller*")?

2. Was the lower courts' apparent acceptance of the mere termination of the distributorship contract as in itself being conclusive evidence of withdrawal from the conspiracy by Richardson in conflict with the holding of this Court in *Hyde v. U.S.*, 225 U.S. 347, 368-372 (1912), (hereinafter "*Hyde*")?

3. Was Rule 56(f) of the Federal Rules of Civil Procedure correctly interpreted and applied where the Circuit Court imposed a "Catch 22" by saying Plaintiffs must *identify* what facts were within Defendants' *exclusive* control and how, if at all, discovery would assist in bringing *those* facts *to light*?

STATUTES INVOLVED

The statutory provisions are: Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2); Section 4 of the Clayton Act (15 U.S.C. Sec. 4); 28 U.S.C. Sec. 1337; Rule 56, Subparagraphs (c) and (f), of the Federal Rules of Civil Procedure are also involved. These are printed in Appendix E hereto.

STATEMENT OF THE CASE

The product involved is furazolidone which is a drug chiefly used as a poultry or swine feed additive to combat bacterial diseases. Plaintiffs purchased furazolidone for use and/or resale.

This is antitrust class action litigation on behalf of all similarly situated farmers and other agri-business entities in the United States. The primary thrust alleges an antitrust violation in the restraint by Norwich and Richardson, as co-conspirators and/or as monopolists, of the importation into the United States for use or resale of furazolidone manufactured and sold outside the United States by a wholly owned subsidiary of Norwich (hereinafter "Canadian Norwich"). The patent in question, U.S. No. 2,742,462, was obtained in 1956 and expired April 23, 1973. In March of 1968 Norwich filed a complaint with the Tariff Commission and President Lyndon B. Johnson by letter of August 28, 1968, requested the Secretary of the Treasury to forbid entry pursuant to 19 U.S.C. sec. 1337(f) until the Tariff Commission investigation, begun July 19, 1968, was completed. The Tariff Commission issued its final report in November of 1969, and sent it to the President, but he did not act to make it permanent under 19 U.S.C. Sec. 1337(e).

During the period it held the patent, Norwich marketed the drug both domestically and internationally. It marketed furazolidone domestically solely through the Hess & Clark Division of defendant Richardson. By agreement entered into January 1, 1955, Richardson acted as the exclusive domestic distributor of furazolidone for Norwich. That agreement terminated December 31, 1969, *but Richardson did not go out of*

the proprietary veterinary business until it sold the assets of its Hess & Clark Division on June 30, 1971.

Hess & Clark marketed furazolidone domestically at prices far in excess of those at which it was marketed in Canada by the wholly-owned subsidiary of Norwich. That is, Canadian Norwich product could be purchased in Canada by Americans at prices significantly lower than those at which it was sold by Richardson in the United States. This pricing disparity gave American farmers and other agri-businessmen the economic incentive to attempt the importation into the United States of the Canadian Norwich product from Canada. Norwich brought some 56 patent infringement actions against such American farmers and agri-businessmen but none were tried on the merits.

Plaintiffs filed this antitrust action on June 7, 1974 (jurisdiction under 15 U.S.C. Section 4, and 28 U.S.C. Section 1337) and alleged in Count I that Richardson, Norwich and Canadian Norwich conspired in violation of the Sherman Act to prevent the importation into the United States of the Canadian Norwich furazolidone, for the purpose of maintaining at anticompetitive levels the price of the domestically marketed product. Plaintiffs also alleged that they had been prevented from earlier discovering this cause of action by the Defendants' fraudulent concealment of the subsidiary corporate relationship between Norwich and Canadian Norwich. The Complaint further alleged, in Count II, that Norwich's furazolidone patent was obtained by fraud on the patent Office and was void and unenforceable and was employed by Richardson and Norwich in violation of the Sherman Act. The Defen-

dants immediately moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure as to all claims accruing more than four years prior to the filing of the Complaint, by striking the claim of fraudulent concealment. The District Court held that Plaintiffs could have discovered their present cause of action by examining the Tariff Commission Report issued November, 1969. Additionally, because Richardson was itself alleged by Defendants' to have not made any sales of furazolidone to anyone after December 31, 1969, the date of expiration of the distributorship agreement with Norwich, the District Court dismissed the complaint entirely as to it. The Court's action had the apparent effect of leaving the complaint intact only with respect to Norwich's activities within the limitations period.

ARGUMENT IN SUPPORT OF THE REASONS FOR GRANTING THE WRIT

I

THE DECISION HEREIN DID NOT ALLOW PLAINTIFFS ANY DISCOVERY AND IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *POLLER*.

The opinion of the Eighth Circuit did cite and quote the heart of *Poller* (App. 5, l. 17-24) and interpreted *Poller's* policy to prohibit summary judgment *on the merits* in antitrust litigation where there has been no opportunity for discovery. Despite this clarion call of *Poller*, the Circuit Court went to find conclusively against Plaintiffs on a lack of "*evidence*" (App. 14, l. 3) (emphasis added).

The relief asked of this Court is straightforward under *Poller*. The heart of the involvement of Richardson centers on its "border watch" activities; i.e. that Richardson conspired with Norwich to violate the antitrust laws by monitoring the importation of furazolidone and reporting to Norwich instances of importation. This allegation was proven with exactitude from certain papers included with the Defendants' supporting summary judgment affidavits. However, said proof related only to specific instances outside the four year statute of limitations. In considering this question the Circuit Court said the complaint did not disclose this issue (App. 13, l. 13) and Plaintiffs had "failed to raise this issue" (App. 13, l. 12) and had "stood by silently" (App. 13, l. 15). The Circuit Court held that "in view of Plaintiffs' inaction the District Court properly entered summary judgment". (App. 13, l. 17). With all due respect to the Eighth Circuit this simply is not true. It cannot be said that Plaintiffs' stood silently by when it was during oral argument before the District Court herein that

Plaintiffs' counsel expressly "coined" the term "border watch" in alleging it against Richardson and asking for answers to interrogatories already served and depositions to follow. At page 30 of the appellate Appendix the transcript of oral argument before the District Court on September 18, 1974, reports:

> Mr. Thomas: "Sure they do, Your Honor. We don't tell them they have to read each one. They are broad. They are going into their activities, their contracts, their relationship. For example, looking ahead to depositions, somebody put a border watch on here. Somebody continued that border watch. It was very likely the fieldmen, and my understanding is, but I have no absolute proof of this at this time and I am just arguing, looking ahead to deposition which will immediately constructively follow, is these were salesmen of Richardson-Merrell, who were the eyes and ears of Norwich, who then came into court."

The Circuit opinion went on to hold conclusively that Plaintiffs' had failed to produce "any *evidence*" (App. 14, l. 3) (emphasis added), of "border watch" activities within the four year statutory period and it affirmed conclusively that upon expiration of the distribution contract December 31, 1969, Richardson was no longer in a position to violate the antitrust laws. This finding of a lack of *evidence* of the alleged antitrust activities resulted in trial by affidavit on the merits. The lack of sales after December 31, 1969, does not necessarily extricate Richardson from violating the antitrust laws since Plaintiffs' allege that Richardson nevertheless continued its "border watch" activities thereafter. It is now recognized Hornbrook antitrust law that when damage from a conspiracy has occurred, each member of the conspiracy is liable for that damage. *Wall Products Co. v. National Gypsum Co.*, 375 F. Supp. 832, 840 (N.D. Cal. 1973); *State of Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802, 804-05 (D. Hawaii 1968). All conspirators are joint tort-feasors, and plaintiffs in an antitrust conspiracy suit can choose to bring the action against as many or as few of the conspirators as desired. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1, 8 (9th Cir. 1963); *Wainwright v. Kraftco Corp.*, 58 F. R. D. 9, 12 (N.D. Ga. 1973).

A further evidentiary ruling was made by the Circuit Court conclusively holding that the alleged improper infringement actions were deemed to have been filed "in good faith" (App. 12, l. 22) directly contrary to the recent opinion in *Rex Chainbelt, Inc. v. Harco Products, Inc.*, 512 F. 2d 993 (9th Cir. 1975) where that Court noted that infringement suits may play a part in an overall plan to unduly restrain or monopolize commerce in violation of the antitrust laws.

After the holding of the Circuit Court, an express "border watch" suit was filed in the same District Court by Plaintiffs against Richardson. "Suit II" was filed August 14, 1975, with immediate discovery again sought. Again Richardson filed for summary judgment but this time based it on alleged res judicata of the first suit. Richardson is now alleging the dismissal was a final judgment on the merits but plaintiffs deny it was on the merits for res judicata. Oral argument was heard October 2, 1975, and Judge Larson has it under consideration this date, after having issued the "final" judgment Order of December 18, 1975, (App. 28, l. 2), apparently to allow the bar of res judicata. The Complaint in "Suit I" did plead in paragraph 10 that Richardson "sold its Hess & Clark Division on or about June 30, 1971". Also, subparagraphs (a), (b) and (c) of paragraph 21 expressly accused the Defendants

of preventing and precluding the importation of Canadian Norwich product. Under the rudiments of "notice pleading" it can certainly be said that these paragraphs especially subparagraphs (b) and (c) encompassed the "border watch" activities, (App. 31-32). Consequently, no amendment is needed to the Complaint should this Court remand for discovery proceedings about "border watch" activities after December 31, 1969. It is striking that the Eighth Circuit reversed summary judgment and ordered a remand in *Warner v. First National Bank of Minneapolis*, 236 F. 2d 853 (8th Cir., 9/11/56). That Court there held that a portion of a continuing series of wrongful acts alleged by beneficiaries against an advisor of an estate could be timely if proved on remand to have occurred as alleged within the statue of limitations. See 236 F. 2d, at 862 and 863. Further, and most recently, the Eighth Circuit affirmed summary dismissal in an antitrust case upon a showing of a lack of interstate commerce Sherman Act jurisdiction. In *Diversified Brok. S., Inc. v. Grtr. Des Moines Bd. of Realtors*, 521 F. 2d 1343 (8th Cir., 1975) the opinion by Judge Bright avoided remand for further proceedings by carefully pointing out that those Plaintiffs had been given "ample opportunity" to present evidence by being "*afforded a full opportunity for discovery*", 521 F. 2d, footnote 3 at 1347-48 (emphasis added). It is inexplicable why Plaintiffs herein have not been afforded a similar opportunity vis-a-vis the alleged continuing "border watch" activities of Richardson.

II

THERE IS CONFLICT BETWEEN THE DECISION HEREIN AND OTHER CIRCUITS ALLOWING DISCOVERY IN APPLYING THE POLICY OF *POLLER*.

1. *SECOND CIRCUIT*—In *Johnson v. RAC Corp.*, 491 F. 2d 510, 512 (2nd Cir. 2/5/74) ordered remand for discovery as to that corporate defendant's activities *after* the alleged dissolution of the corporation. Reasonable opportunity for discovery was held to be especially needed where the facts upon which the defendant relied in its motion lay peculiarly within the defendant's knowledge. The district court was held to have wrongfully accepted the defendant's affidavits as a conclusive denial of the allegations. NOWHERE HAS RICHARDSON EVER DENIED BORDER WATCH ACTIVITIES AFTER DECEMBER 31, 1969. Richardson simply said it made no sales of furazolidone after December 31, 1969.

In *Modern Home Institute, Inc. v. Hartford Acc. Ind. Co.*, 513 F. 2d 103 (2nd Cir., 1975), that court affirmed summary judgment for antitrust defendants but only after eight years of exhaustive discovery. That court carefully applied the policy of *Poller*, 513 F. 2d at 109-110.

2. *FOURTH CIRCUIT*—In *Parker Dodge v. Chrysler*, 1975 Trade Cases, para. 60, 283 (4th Cir. 1975) at page 66, 104, that court affirmed summary judgment in part for an antitrust defendant but noted there had been extensive discovery proceedings and even so reversed in part for a full trial.

FIFTH CIRCUIT—In the long standing antitrust litigation in *Poster Exchange Inc. v. National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975) a remand was granted for opportunity for Poster to present "a triable issue of fact as to the occurrence of any specific *act or word*" during the statutory limitation period, 517 F. 2d 117, at 129 (emphasis added).

A Petition for Certiorari was filed November 4, 1975 by Poster for that opinion along with a companion holding. That Petition is No. 75-667, October Term, 1975.

3. *SEVENTH CIRCUIT*—In *Tankersley v. Albright*, 514 F. 2d 956 (7th Cir., 1975) that Court reversed summary judgment for defendant in a shareholder case where plaintiffs couldn't yet allege details of specific transactions because defendants had nearly exclusive control of the evidence records to substantiate or refute the claims, 514 F. 2d at 964.

4. *NINTH CIRCUIT*—In *A.L.W., Inc. v. U.A.L.*, 510 F. 2d 52 (9th Cir., 1975) that court affirmed summary judgment for an antitrust defendant based on a lack of evidence of the conspiracy but carefully quoted the discovery described in rule 56(c) (App. 30, l. 25) and noted that plaintiff had made full use of the discovery process, 510 F. 2d at 55 and 58.

In *Anderson v. American Automobile Assn.*, 454 F. 2d 1240 (9th Cir. 1972), that court affirmed summary judgment in part (boycott activities) but painstakingly discussed the policy of *Poller* and how that plaintiff had been afforded full discovery opportunity to develop the facts, 454 F. 2d at 12.

5. *TENTH CIRCUIT*—In *Craig v. Sun Oil*, 515 F. 2d 221 (10th Cir., 1975) that court affirmed summary judgment for that antitrust defendant but noted that it was only at the conclusion of discovery and after the filing of affidavits by plaintiff, 515 F. 2d at 222.

6. *FIRST CIRCUIT*—Added to the above should be *Yaffee v. Powers*, 454 F.2d 1362 (1st Cir., 1972) where that court held it was an abuse of discretion to deny class action status without discovery where the allegation may depend on information wholly within defendants' ken, 454 F. 2d, at 1366.

III

THE DECISION HEREIN IGNORED THE CONTINUING PURPOSE AND EFFECT AND LACK OF REPUDIATION OF THE CONSPIRACY AND IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *HYDE*.

Without allowing discovery, the District and Circuit courts apparently accepted the natural termination of the distribution contract as conclusive of the date of effective withdrawal from the conspiracy. This was held despite the allegations that the patent itself was obtained with the illegal conspiratorial purpose in mind to have effect the life of the patent (expired April 23, 1973) and despite the allegations of ongoing "border watch" involvement of Richardson after termination of the distribution contract December 31, 1969.

In *Hyde*, despite disclosure by the withdrawing criminal co-conspirator this Court affirmed a jury finding him liable for subsequent acts if after the first disclosure he acquiesced in the later acts. This Court noted he had started the evil forces and thereafter had to sufficiently withdraw support which he failed to do despite the disclosure to the government, 225 U.S. at 370. The approved jury instruction is quoted at 225 U.S. at 371-372. Richardson made no overt repudiation herein. The "border watch" continued after December 31, 1969, and Richardson has not denied its involvement therein after said date.

Right in line with *Hyde*, is an Eighth Circuit opinion by another panel of judges at the time of decision herein.

In *U.S. v. Cohen*, 516 F.2d 1358 (8th Cir. 5/19/75). In that mail fraud conspiracy case, Mr. Justice Clark, retired from this Court, held that the withdrawing co-conspirator continues

to be liable for subsequent acts until he does some act to disavow or defeat the purpose of the conspiratorial scheme. In the opinion Mr. Justice Clark quoted, 516 F. 2d at 1364-65, from the Ninth Circuit, the full quote of which is 409 F. 2d at 792-93 (CA 9):

> "The case is perhaps less clear as to the mailings which occurred after the time at which appellant asserts he withdrew from the enterprise. However, the scheme charged was a continuous one, and each participant in a continuing scheme is bound by the acts of his confederates 'until he does some act to disavow or defeat the purpose' of that scheme. Hyde v. United States, 225 U.S. 347, 369, 32 S.Ct. 793, 803, 56 L.Ed. 1114 (1912). Although appellant Reisman resigned as president and director of the Gamble Land Company and ceased to participate in the company's day-to-day business operations, he remained a major stockholder *and took no affirmative action to disavow or defeat the promotional activities which he had joined in setting in motion.* We think more was required to terminate his liability for *the continuing conduct of his confederates.*
>
> Reversed and remanded." (emphasis added).

Additionally, the Eighth Circuit has itself made rulings on the continuing effect of a monopoly avoiding a statute of limitations bar in *Highland Supply Corp. vs. Reynolds Metals Co.*, 327 F. 2d 725 (1964) and *Pioneer Company, Inc. vs. Talon, Inc.*, 462 F. 2d 1106 (1972). For some reason unknown to Plaintiffs, the Circuit opinion herein did not address this argument of Plaintiffs.

IV

PLAINTIFFS' RULE 56(f) AFFIDAVITS WERE NOT DEFICIENT.

The opinion of the Eighth Circuit sets up a "Catch 22" because it is impossible for any plaintiff to identify facts within the defendants' *exclusive* "control" or "knowledge" (App. 15, l. 16). If the facts could be so *identified* they wouldn't need to be discovered and wouldn't be within the defendants' *exclusive* knowledge or control. The cases cited by the Eighth Circuit just do not so hold, except possibly the district court in *Okaloosa*, but see *infra*, and that is *not* the law of the Fifth Circuit for in *Tyler v. Vickery*, 517 F. 2d 1089, 1095 (3rd Cir. 8/19/75) that Circuit held that:

> "Fed. R. Civ. P. 56(f) requires that a party unable to show facts essential to his opposition present to the court *the reasons for its inability to produce such evidence*". (emphasis added).

That opinion further noted that those plaintiffs had not made a request for *further discovery.*

The Eighth Circuit's Opinion (App. 15, l. 20) first cites the *Halpern* case but the Third Circuit there really only said with respect to opposition by that defendant, 260 F. 2d at 591:

> ". . . at least in the absence of a showing, such as is contemplated by Rule 56(f), that all of *the facts were necessarily within the exclusive knowledge of the plaintiffs* and not accessible to the defendants". (emphasis added).

Even the *Okaloosa* court delayed ruling for 10 days to allow plaintiffs to show why discovery might be helpful to thereafter oppose the motion. See 332 F. Supp. at 1269.

The last case cited (App. 16, l. 3) by the Eighth Circuit here is *Toebelman*. But the Third Circuit there appointed an ac-

countant to make discovery examination of books, 130 F. 2d at 1018; and then reversed summary judgment as to part of the claim and succinctly noted that:

> "This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared ex parte. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. *The plaintiffs should, therefore, be given a reasonable opportunity, under proper safeguards, to take the depositions and have the discovery which they seek.* Under this procedure all the issues involved in the accounting cause of action will be open for further proof and determination.
>
> The judgment of the district court is reversed in so far as it denies the prayers of the complaint, for discovery". (emphasis added.)

The Rule 56(f) affidavits (App. G) herein pointed out that an antitrust conspiracy was being alleged and described that discovery had been commenced. It is hornbook antitrust law (e.g. *Poller*) that such an allegation speaks for itself that the conspiratorial facts are necessarily within the exclusive control of defendants. Those affidavits fit exactly within the above cited cases and most certainly come within the *Poller* decision as quoted in the Circuit opinion herein (App. 5, l. 17).

The Circuit Opinion herein (App. 6, l. 20) relies heavily on the Sixth Circuit opinion in *Akron Presform Mold Co., v. McNeil Corp.*, 496 F. 2d 230, 232-33, (1974). Historically, that controversy had multiple *trials*. The Sixth Circuit was careful to note that had been an "extended controversy", 496 F. 2d at 231, including, but not limited to, a *trial* and appeal on

patentability and a *trial* without appeal on the unlawful aspects of the licensing agreement, 496 F. 2d at 231 and 235 (collateral estoppel). More importantly, that plaintiff admitted that the last overt acts of the conspiracy occurred outside the statute, 496 F. 2d at 232-233. This is in direct contradistinction to Plaintiffs herein who have never so conceded.

V

THIS IS A MATTER OF SPECIAL PUBLIC IMPORTANCE.

The Eighth Circuit expressly noted twice that *Americans* were being price gouged in comparison to foregoners. The Opinion noted (App., 3, l. 21):

> "Hess & Clark marketed furazolidone *domestically* at *prices far in excess* of those at which it was marketed in other countries by licensees or subsidiaries of Norwich. Moreover, Norwich's Canadian subsidiary, Norwich Pharmacal Company, Ltd., sold furazolidone at *prices significantly lower* than those at which it was sold in *other foreign countries.* This *pricing disparity* gave rise to widespread clandestine importation of the drug into the United States, particularly from Italy, Israel, and *Canada*". (emphasis added).

The class of farmers and other agri-businesses directly involved in the "border watch" stretch from the named plaintiffs in Minnesota to such typical places as the "Joe N. Pless Company" in Forest, Mississippi; "William J. Kover, Jr. Poultry Farm" in Booneville, Mississippi; "The Model Mills" in Jackson, Tennessee; and the "Roy Tucker Poultry Farms" in Hamilton, Mississippi, all where the Canadian Norwich product was spotted and reported by Richardson to Norwich in 1969, as confirmed in the limited Record below.

CONCLUSION

The lower courts literally "threw the baby out with the wash". That is, in ruling against Plaintiff on the issue of fraudulent concealment because of the Tariff Commission Report, the lower courts went further to exculpate Richardson on a lack of *evidence* of involvement after December 31, 1969. There was no law cited for such premature dismissal of Richardson. The Circuit opinion did cite twice the Opinion of this Court in *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968) (App. 6, l. 11; App. 7, l. 5) but failed to disclose that that action had been in existence some eleven years with the summary judgment motion pending five years. Further, this Court noted therein that extensive discovery had been allowed as the motion had been earlier denied to allow further discovery for evidence of antitrust conspiracy activity, 391 U.S. at 272-273.

By concluding herein that Plaintiffs' "border watch" allegations failed for a lack of a showing of *evidence* of such activity after December 31, 1969, the Eighth Circuit paid only lip service to the policy enunciated by this Court in *Poller* and instead reached a result inimicable to it. It is now requested that this Court rectify the predicament of Plaintiffs as provided for in 28 U.S.C. Section 2106.

Respectfully submitted,
COCHRANE & BRESNAHAN
By John A. Cochrane
John E. Thomas
Attorneys for Plaintiffs-Petitioners
Suite 500 Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102
612/298-1950

ADDENDUM

This is written because after submission of this Brief to the printer, the District Court issued It's opinion dated December 22, 1975, granting Richardson's summary judgment motion in Suit II, by holding that, "the defense of *res judicata* is dispositive of this case". (Op. p. 1). A few concise comments on the dismissal Memorandum Decision (reproduced hereinafter) as it bears on this Appeal follow:

First, in dramatic fashion the key date of "no involvement" of Richardson ("RMI") has now shifted from December 31, 1969, to "June 30 or July 1, 1971" (Op. p. 1). The later date was *within* the limitations period for Suit I and would have precluded that dismissal, but now it is said to be a bar to Suit II. Plaintiffs are whipsawed between the two dates! No consideration is given to the allegation in Suit II of fraudulent concealment after December 31, 1969. The Tariff Report relied on by the lower courts to avoid fraudulent concealment tolling in Suit I could not have been similarly used in Suit II because that Report disclosed that the distribution contract expired December 31, 1969, and therefore, wouldn't disclose continuing border watch activities of Richardson after that date.

Second, the District Court compounds the overlooking of It's own original Record herein by simply citing the appellate opinion and concluding that the "border watch" question "was not raised prior to *or at the hearing for summary judgment*" (Op. p. 3) (emphasis added). This simply is not a true reflection of the clear and express Record in Suit I. See the transcript of the oral argument reproduced, *supra*, page 8.

Third, the District Court goes on to further compound the oversight of It's Record in Suit I by now holding that Plaintiffs could not have "stood by silently", "failing to assert" all

their conspiracy theories in opposition to the Richardson motion in Suit I (Op. p. 4). The District Court has now held in Suit II that Plaintiffs are barred forever by res judicata on the border watch conspiracy allegations because they could have been raised in Suit I. In reality, there has never been any failure by Plaintiffs to assert the border watch! Dismissing Plaintiffs is a gross oversight of the Record and a violation of the policy of *Poller*. This can only be remedied by this Court. The very recent language of the Fifth Circuit is most apt here. In *Ingalls Iron Works v. Freuhauf Corp.*, 518 F. 2d 966 (5th Cir. 1975) that court reversed summary judgment and sharply noted the danger in accelerated summary judgment where that opinion said:

> " 'It also bears repeating that "[t]he utility of this marvelous instrument of summary judgment is not lessened or its importance weakened because it has limitations." Certainty, or predictable certainty, if not actually unobtainable, is often an illusion in the complex variables which pass through a courthouse door. The rules contemplate that a judge can take a first and second and a third and a final look. It is the predictable uncertainty which sometimes makes this necessary. But that is a part of the process by which controverted facts are resolved and, occasionally, facts apparently controverted are established to be uncontradicted in fact' ".

and concluded by holding that:

> ". . . we say only that *as the case comes to us now the District Judge may not cut the gordian knot with F.R. Civ. P. 56*". (emphasis added).

Similarly, this Court is respectfully asked to retie the gordian knot that has been prematurely cut in this procedural imbroglio upon an overlooked record and a result in violation of *Poller*.

[P. 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-75-Civil 413

WILLMAR POULTRY COMPANY, et al.,
Plaintiffs,

vs.

RICHARDSON-MERRELL, INC.,
Defendant.

MEMORANDUM DECISION

This case (hereafter "Suit 2") was filed on August 14, 1975. Over one year earlier, on June 7, 1974, the plaintiffs in the present action filed a two Count complaint, naming as defendants the defendant herein along with Morton-Norwich Products, Inc. The earlier filed case was No. 4-74-Civil 276 and was denominated *Willmar Poultry Co. v. Morton-Norwich Products, Inc.* (hereafter "Suit 1"). Suit 1 alleged violations of §§ 1 and 2 of the Sherman Act and patent misuse. The defendant herein, Richardson-Merrell, Inc. (hereafter "RMI"), moved for summary judgment in Suit 1 on the ground that all claims against it were barred by the statute of limitations. By its Order of October 1, 1974 (hereafter October 1st Order), this Court granted RMI's motion.

The Eighth Circuit Court of Appeals affirmed the October 1st Order in *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975) (hereafter "*Willmar Poultry*"). Like Suit 1, Suit 2 alleges violations of §§ 1 and 2 of the Sherman Act regarding the product furazolidone. RMI

has again moved for summary judgment, asserting that Suit 2 is barred not only by the statute of limitations but by principles of *res judicata* as well. Since the defense of *res judicata* is dispositive of this case, it will be unnecessary to consider defendant's statute of limitations arguments.

The factual background to Suit 2 is adequately stated in the October 1st Order and in *Willmar Poultry*. One further fact worthy of note is that on June 30 or July 1, 1971, more than four years before commencement of Suit 2, RMI sold its Hess & Clark Division, and apparently since that time has had no involvement in the veterinary supply business.

Plaintiffs' position is that *res judicata* cannot be applied here because the decisions of this Court and of the Eighth Circuit in Suite 1 were not on the [P. 2] merits as to Plaintiffs' present claims. Two issues are allegedly thus immunized from the reach of *res judicata*. First is the question whether RMI is liable for the acts of others occurring within the limitations period on a theory of continuing tort because of RMI's failure to take affirmative steps to withdraw from an alleged conspiracy. Plaintiffs claim secondly that RMI itself engaged in border watch activities within the four year limitations period and that this activity gives rise to liabilty.

Plantiffs' argument confuses the doctrines of *res judicata* and *collateral estoppel*. *Res judicata* prevents relitigation of a cause of action once that cause of action has been decided on the merits. The entire cause of action is thus barred by, or merged into, the first judgment. Issues which could have or should have been litigated but were not litigated in the first suit are nonetheless foreclosed from being relitigated in a lawsuit asserting the same cause of action previously decided.

> "The doctrine of *res judicata* serves the purpose of judicial finality. If there is a final, valid judgment rendered on the merits, the doctrine precludes relitigation of the same cause of action between the same parties or their privies. The judgment is a conclusive determination 'as to the claim or demand in controversy . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 F.2d 583, 587 (3rd Cir. 1975) (hereafter "*Donegal Steel*").

This is "elementary" learning. *Williamson v. Columbia Gas & Electric Corp.*, 91 F. Supp. 874, 877 (D. Del. 1950), *aff'd*, 186 F.2d 464 (3rd Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (hereafter "Williamson"). Collateral estoppel, on the other hand, concerns only the relitigation of particular issues, usually in a second lawsuit involving a separate cause of action from the first lawsuit. Unlike *res judicata*, collateral estoppel supplies only when issues have been actually raised and conclusively determined in the prior litigation. *Donegal Steel, supra*, at 588. *See*, 1 B Moore, Federal Practice (2d ed.) para. 0.405[1] pp. 621-22. Collateral estoppel requires that the particular issue be decided on the merits; *res judicata* requires only that the larger cause of action, of which the particular issue is a part, be decided on the merits.

Since the parties in Suit 2 are identical to parties in Suit 1, the sole issues to be determined are whether the decision in Suit 1 was on the merits of the cause of action presented there, whether that decision is final for purposes of *res judicata*, and whether Suit 1 and Suit 2 assert the same cause of action.

The decision in Suit 1 was clearly on the merits of that cause of action. For purposes of *res judicata* "the dismissal of the

action by reason of its being [P. 3] barred by the statute of limitations is an adjudication upon the merits." *Williamson, supra,* 91 F. Supp. at 880. This is always the case where the same statute of limitations is applied to both suits. 1 B Moore, *supra,* para. 0.409 [6]. The grant of summary judgment is a decision on the merits of a cause of action for *res judicata* purposes. 10 Wright & Miller, Federal Practice and Procedure: Civil § 2712 at 386.

The parties state that plaintiffs' time to petition the United States Supreme Court for a writ of certiorari in *Willmar Poultry* has been extended and has not expired. This fact is unimportant, for "[t]he federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo.*" 1 B Moore, *supra,* para. 0.416[3] at 2252. Any possible doubt whether the dismissal of RMI in Suit 1 is final was resolved by this Court's Order of December 18, 1975.

The crucial issue in this case is whether Suit 2 asserts the same cause of action which has finally been determined in Suit 1. Plaintiffs' position that the continuing conspiracy theory was not part of the same cause of action because it was ignored by the Court in Suit 1 is factually mistaken. In the October 1st Order the Court stated:

> "Plaintiffs argue that the statute should be tolled as to the party abandoning the conspiracy at least until that party takes affirmative action to nullify the continuing consequences of the conspiracy. Applied to the case at bar, this theory would defeat Richardson-Merrill's [sic] motion for summary judgment dismissing it from the

> action." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.,* No. 4-74-Civil 276 (D. Minn., October 1, 1974) at 3-4.

The Court rejected plaintiffs' theory. And although the question of the existence or nonexistence of border watch activities was not raised prior to or at the hearing for summary judgment in Suit 1, it was presented in a motion to amend or alter the October 1st Order. *Willmar Poultry* at 296-97. It seems clear that at least in plaintiffs' view the border watch issue was intertwined with the cause of action presented in Suit 1. Whether or not the border watch question was actually litigated in Suit 1, it obviously could have been litigated there, and Suit 1 "is conclusive as to all matters which were or *could have been* litigated in the first proceeding . . ." *Gissen v. Tackman,* 401 F. Supp. 310, 312 (D. N.J. 1975) (Emphasis in original). *See also, Donegal Steel, supra; Williamson, supra;* 1 B Moore, *supra.*

The Court is convinced that Suit 1 and Suit 2 involve the same cause of [P. 4] action. The complaint and amended complaint in Suit 2 are almost entirely verbatim restatements of the complaint in Suit 1. The complaints in both suits concern conspiracy, monopolization and attempts to monopolize continuing well into 1973, regarding the same product, furazolidone. The effects alleged to flow from these activities are the same in both lawsuits. The prayer for relief is substantially the same in both lawsuits.

It is true that the concept of a cause of action is different for different purposes. Though in a conspiracy case "each invasion of a plaintiff's interest . . . creates a new cause of action" for purposes of a statute of limitations defense, nonetheless, for purposes of *res judicata* the conspiracy as a whole is a single cause of action. *Williamson, supra,* 186 F.2d at 469-

70; *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964). It follows that the result in this case would be the same even if continuing conspiracy and border watch had never been mentioned in Suit 1. When defendant raised the statute of limitations defense in Suit 1, plaintiffs could not have "stood by silently" (*Willmar Poultry* at 296), failing to assert all their conspiracy theories and continuing act theories in opposition to defendant's motion. Defendant's motion in Suit 1 put in issue the *entire* cause of action underlying Suit 1, including what was argued and what should have been argued, and this Court's final judgment in Suit 1 bars Suit 2 under principles of *res judicata*.

Defendant moves the Court to award defendant attorneys' fees on the ground that Suit 2 is frivolous and vexatious. The award of attorneys' fees is a matter resting with the discretion of the Court, and the essential issue is whether the unsuccessful litigant has acted in bad faith. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973). Confusion between the doctrines of *res judicata* and collateral estoppel does not demonstrate bad faith, and the Court does not find plaintiffs' conduct to be so vexatious as to require an award of attorneys' fees.

IT IS ORDERED:

1. That defendant's motion for summary judgment is granted and this action is dismissed.

2. That defendant's motion for attorneys' fees is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

EARL R. LARSON
United States District Judge

December 22, 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1893

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT,
On behalf of themselves and all others similarly situated,
Appellants,

v.

MORTON-NORWICH PRODUCTS, INC. and RICHARDSON-MERRELL, INC.,
Appellees.

Submitted: April 17, 1975.
Filed: July 17, 1975.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Before JONES, Senior Circuit Judge;* and HEANEY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

The plaintiffs in this antitrust action, Willmar Poultry Company, Peterson-Biddick Company, and Lynn Tompt, an individual,[1] appeal from an order granting summary judg-

* WARREN L. JONES, Senior Circuit Judge, Fifth Circuit Court of Appeals, sitting by designation.

[1] Plaintiffs also sue on behalf of all other persons similarly situated. The district court has not yet ruled on whether they may maintain this action on behalf of a class.

ment in favor of Richardson-Merrell, Inc., (Richardson) and dismissing it as a defendant and granting partial summary judgment in favor of Morton-Norwich Products, Inc., (Norwich) and dismissing as to it all claims accruing prior to June 7, 1970. The district court entered summary judgment after determining that the plaintiffs' claims were time-barred.

On appeal,[2] the plaintiffs contend that entry of summary judgment in advance of discovery is impermissible in an antitrust case such as this, alleging violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1970). We disagree. We hold that the court properly concluded that the four-year statute of limitations of §4B of the Clayton Act, 15 U.S.C. §15b (1970),[3] barred the plaintiffs' action with respect to all conduct by the defendants occurring before June 7, 1970, and properly entered summary judgment without awaiting the results of discovery.

I. *Factual and Procedural Background.*

Because we direct our inquiry in this case to the procedural propriety of the district court's summary disposition of a part of the plaintiffs' action, it will prove helpful to preliminarily outline the facts from which the complaint originates and the proceedings in the district court leading to summary judgment.

---

[2] The district court certified this interlocutory appeal from the summary judgment and we granted review pursuant to 28 U.S.C. §1292 (b) (1970).

[3] Section 4B provides as follows:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections. [15 U.S.C. §15b (1970).]

A. Facts.

The plaintiffs in this action either use or buy and sell, or both, furazolidone, a broad-spectrum member of the nitrofurans group of drugs effective in combating infectious diseases, primarily in poultry. According to the complaint, Willmar Poultry Company purchases furazolidone as a feed additive for the turkeys which it hatches and grows; it also sells furazolidone to other growers. Peterson-Biddick adds furazolidone to the feed used in raising the turkeys that it grows. Lynn Tompt buys furazolidone for resale to veterinarians and feed salesmen, among others.

Norwich held the patent on furazolidone, U.S. Patent No. 2,742,462, from April 17, 1956, to April 17, 1973. During this period it marketed the drug both domestically and internationally. It marketed furazolidone domestically solely through the Hess & Clark Division of Richardson. By agreement entered into January 1, 1955, between Richardson's predecessor, the Vick Chemical Company, and Norwich, Hess & Clark acted as Norwich's domestic distributor of furazolidone. The agreement terminated December 31, 1969.

Hess & Clark marketed furazolidone domestically at prices far in excess of those at which it was marketed in other countries by licensees or subsidiaries of Norwich. Moreover, Norwich's Canadian subsidiary, Norwich Pharmacal Company, Ltd., sold furazolidone at prices significantly lower than those at which it was sold in other foreign countries. This pricing disparity gave rise to widespread clandestine importation of the drug into the United States, particularly from Italy, Israel, and Canada. To combat this importation and preserve its control over the domestic market, Norwich brought from 1963 through 1969 some 56 patent infringement actions against dealers and others attempting to market the imported drug.

Additionally, at Norwich's request, the United States Tariff Commission investigated this importation to determine if it constituted an unfair method of competition sufficiently injurious to Norwich's domestic business to warrant an order, pursuant to §337 of the Tariff Act of 1930, as amended, 19 U.S.C. §1337 (1970), excluding from entry into the United States all furazolidone. Following a full investigation and publication of its findings in November of 1969, the Tariff Commission recommended to the President that such an order be issued, effective through the expiration of Norwich's patent, April 17, 1973.

B. Proceedings in the district court.

The plaintiffs filed the instant antitrust action June 7, 1974. They alleged in count I of their complaint that Richardson and Norwich conspired, in violation of the Sherman Act, to prevent the importation into the United States of furazolidone for the purpose of maintaining at anticompetitive levels the price of the domestically marketed product. They alleged that they had been prevented from earlier discovering this cause of action by the defendants' fraudulent concealment of it. They further alleged, in count II, that Norwich's furazolidone patent is void and unenforceable and has been employed by Richardson and Norwich in violation of the Sherman Act.

The defendants moved to strike the claim of fraudulent concealment. They contended that they had not concealed the cause of action. On the contrary, they asserted that all the facts underlying the action were public knowledge as a result of Tariff Commission's investigation and report. The district court agreed and struck the fraudulent concealment claim.

The defendants also moved for summary judgment as to all claims accruing prior to June 7, 1970, the date four years prior to the filing of the complaint. Having found that the defendants had not concealed the cause of action from the plaintiffs, the district court concluded that the statute of limitations had not been tolled[4] and therefore entered summary judgment in favor of the defendants as to all claims arising before June 7, 1970. Because Richardson had not made any sales of furazolidone to anyone after December 31, 1969 , the date of expiration of Hess & Clark's distributorship agreement with Norwich, the district court dismissed the complaint entirely as to it. The court's action had the effect of leaving the complaint intact only with respect to Norwich's activities within the limitations period.

II. *Applicable Law.*

The plaintiffs correctly observe that the courts do not lightly enter summary judgment on the merits in antitrust cases. The Supreme Court has explained this hesitancy in the following terms:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. * * * Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." [*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (footnote omitted).]

Where there has been no opportunity for discovery or it has yet to be undertaken or is incomplete, the courts have applied this policy to prohibit altogether summary judgment on the

---

[4] At oral argument on the motion to strike, the plaintiffs also asserted that the statute had been tolled by the defendants having induced the plaintiffs not to sue within the limitations period. The district court rejected this alternative ground for tolling and we likewise reject it. *See* III A 2 *infra*.

merits in antitrust litigation. *See Umdenstock v. American Mortgage & Investment Co.*, 495 F.2d 589, 592 (10th Cir. 1974); *Penn Galvinizing Co. v. Lukens Steel Co.*, 59 F.R.D. 74, 80 (E.D. Pa. 1973); *First National Bank v. British Petroleum Co.*, 324 F. Supp. 1348, 1360 (S.D. N.Y. 1971); *Philco Corp. v. Radio Corp. of America*, 34 F.R.D. 453, 454-55 (E.D. Pa. 1964).

On the other hand, where there has been ample opportunity for discovery, summary judgment is appropriate in antitrust litigation, just as in any other litigation, upon a showing by the movant of an absence of any genuine issue of material fact. *See, e.g., First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-90 (1968); *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975); *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214, 1216 (8th Cir. 1972). Summary judgment may be appropriate even without opportunity for discovery, however, where, as in the instant case, the ground asserted for judgment is the statute of limitations, a defense not going to the merits of the action. *See Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 232-33, 235 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir.), *cert. denied*, 340 U.S. 943 (1950); *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155, 158-61 (E.D. Pa. 1960); *Solinski v. General Electric Co.*, 149 F. Supp. 784 (D. N.J. 1957).

Regardless of the propriety of summary judgment before discovery in an antitrust case, summary judgment is always warranted where the party resisting the motion does so by relying solely upon his pleadings and submits no evidence to rebut the moving party's conclusive demonstration of absence

of a genuine issue of material fact. Fed. R. Civ. P. 56(e)[5] mandates affirmative action by a party opposing such a motion. Failure to take such action justifies a court in entering summary judgment, regardless of whether the case alleges a violation of the antitrust laws. *See First National Bank v. Cities Service Co., supra*, 391 U.S. at 289-90; *Akron Presform Mold Co. v. McNeil Corp., supra*, 496 F.2d at 235; *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1028 (5th Cir. 1973); *Gasperi v. Cinemette Corp.*, 391 F. Supp. 826, 832-33 (W.D. Pa. 1975). Judge Friendly of the Second Circuit has stated the proper procedure for an opposing party under these circumstances:

> When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents counter-vailing facts. [*Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).]

Where a party opposing a motion for summary judgment cannot, for reasons outside his control, present by affidavit facts essential to justify his opposition, a court may, pursuant to Fed. R. Civ. P. 56(f),

> refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions

---

[5] Rule 56(e) provides in pertinent part as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

to be taken or discovery to be had or may make such other order as is just [*Id.*] [6]

Thus, an affidavit properly submitted under Rule 56(f) has the effect of either postponing entry of summary judgment or precluding it altogether. A party seeking the shelter of Rule 56(f) must do so in good faith, however, and must conclusively justify his inability to respond adequately or not at all to the movant's affidavits:

> [T]he opposing party should present his affidavit showing that the knowledge or control of the facts is exclusively or largely with the moving party and describe his attempts to obtain those facts. The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate; the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures. [6 J. Moore, *Federal Practice* ¶ 56.24 at 2876 (2d ed. 1974) (footnote omitted).]

Accord, School Board of Okaloosa County v. Richardson, 332 F. Supp. 1263, 1269 (N.D. Fla. 1971). *See Robin Construction Co. v. United States*, 345 F.2d 610, 613-14 (3d Cir. 1965); *Peckham v. Ronrico Corp.*, 7 F.R.D. 324, 300 (D P.R. 1947), *rev'd on other grounds*, 171 F.2d 653 (1st Cir. 1948); 10 C. Wright & A. Miller, *Federal Practice and Procedure* §2741 at 734-35 (1973).

---

[6] Rule 56(f) provides in its entirety as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The foregoing principles control the disposition of the instant case. With them in mind, we now consider their application to the facts of the case.

III. *Application of the Law.*

In considering whether the district court properly entered summary judgment for the defendants, we must focus upon three questions: 1) Did the defendants prove by their affidavits the absence of any fraudulent concealment of the plaintiffs' cause of action or of any other conduct by the defendants which would toll the statute of limitations? If we answer this question in the affirmative, we must next ask a second question. 2) Did Richardson prove by its affidavit that it engaged in none of the conduct alleged in the complaint within the limitations period? If we answer this affirmatively, we must then make a final inquiry. 3) Did the plaintiffs fail to comply with the requirements of Rule 56(f), thereby justifying the court in entering summary judgment as requested by the defendants?

A. Tolling of the statute of limitations.

1. Fraudulent concealment.

The plaintiffs seek to recover treble damages under §4 of the Clayton Act, 15 U.S.C. §15, for violations of the Sherman Act by alleging the following wrongdoing by the defendants:

> (a) [The defendants] caused the Customs Bureau and the President to prevent the importing of furazolidone manufactured and sold by Canadian Norwich and others into the United States;
>
> (b) refused and withheld its consent to all such importation;
>
> (c) made repetitive use of litigation which was timed and designed principally to preclude importation into the United States of competitive furazolidone manu-

factured by Canadian Norwich, among others, and thereby to preserve defendants' monopoly;

(d) entered into agreements dividing markets by classes of customers;

(e) imposed tying of sale of other products to furazolidone.

[Complaint at ¶ 21, A:351-52.]

The plaintiffs concede that the cause of action described by these allegations accrued more than four years prior to the filing of the lawsuit. They assert, however, that the defendants fraudulently concealed the cause of action from them, thereby tolling the four-year statute of limitations. Specifically, the plaintiffs contend that they could not have known, even by the exercise of reasonable diligence, that Norwich's Canadian subsidiary was manufacturing furazolidone and selling it at a low price concurrently with Norwich's domestic manufacture of furazolidone and Hess & Clark's distribution of it at a comparatively high price. Thus, they reason, they could not have discovered the conduct described in subsections (a), (b), and (c) of ¶ 21 of the complaint, quoted above.[7]

In moving to strike the claim of fraudulent concealment, the defendants argued that the plaintiffs could have discovered, by reading the Tariff Commission's report on the illicit importation of furazolidone and by reviewing the public testimony taken by the Commission in connection with the

[7] On appeal, the plaintiffs make no effort to challenge the district court's determination that they could have discovered earlier the market division and tying activities alleged in subsections (e) and (f) of ¶21 of the complaint. The United States Department of Justice and one of Norwich's competitors, C. L. Jones, Inc., had called attention in 1968 and 1969—in connection with the Tariff Commission's public investigation of Norwich's complaint of unfair trade practices under §337 of the Tariff Act, 19 U.S.C. §1337 (1970)—to these and other activities of Norwich and Richardson as possible violations of the antitrust laws.

preparation of this report, that Norwich's Canadian subsidiary was manufacturing furazolidone and selling it at a price far below that at which Norwich was then selling it in the United States. In support of this position, they directed the attention of the district court to, among other matters, the following public testimony of Norwich's patent counsel, Bradford S. Allen, before the Tariff Commission on September 30, 1968:

> Norwich's subsidiary, Norwich Pharmacal Company, Ltd., is the only manufacturer of furazolidone crystals in Canada.
>
> * * *
>
> Commissioner Thunberg: Excuse me, Mr. Allen, but you referred a few minutes ago to Canadian furazolidone. Is furazolidone manufactured in Canada other than by your own company?
>
> Mr. Allen: It is not manufactured in Canada other than by our own subsidiary * * *.
>
> * * *
>
> In Canada, the Norwich Pharmacal Company, Ltd., a wholly-owned subsidiary of the Norwich Pharmacal Company [i.e., the defendant], markets at 11 percent furazolidone premix at about $.85 per pound. [A:208, 209, 212.]

Additionally, they directed the court's attention to the following passage from the Tariff Commission's final report, issued in November of 1969:

> Norwich has furnished price data for 40 countries. They are the prices charged by Norwich, or by its foreign subsidiaries, licensees, or distributors in foreign countries. These data are business confidential except for the price of nf-180 made by a Canadian subsidiary, which

> is $0.85 per pound. This price is low in comparison to other prices at which the premix is sold by Norwich or its licensees in other countries. [A:282.]

The district court correctly concluded from this record that the plaintiffs could have discovered, by the exercise of reasonable diligence, their cause of action within the limitations period.

2. Inducement.

Plaintiffs raise an additional argument, unrelated to their claim of fraudulent concealment, in support of the contention that the statute of limitations was tolled by the conduct of the defendants. They assert that the defendants, by filing numerous infringement actions against other parties, induced the plaintiffs to refrain from bringing the instant suit. They accurately cite *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), for the proposition that a party who has induced another to forego filing an action until after the limitations period for the action has run may not thereafter invoke the statute of limitations as a defense. *See also American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974); *Akron Presform Mold Co. v. McNeil Corp., supra*, 496 F.2d at 233. Inasmuch as Norwich filed the actions in good faith to protect its legitimate interest in its patent, however, they do not constitute litigation calculated to induce the plaintiffs to refrain from filing their complaint within the limitations period and therefore do not toll the statute of limitations.

B. Summary judgment in favor of Richardson.

As we have observed, the court below properly concluded that the statute of limitations was not tolled as to either of the defendants. The court dismissed Richardson as a defendant because its subdivision, Hess & Clark, had ceased to distribute furazolidone as of December 31, 1969, the expiration date of

the marketing agreement between it and Norwich. The court reasoned that Richardson was no longer in a position to violate the antitrust laws if it could no longer sell the product at issue, furazolidone.

The plaintiffs contend on appeal, however, that the fact that Richardson made no sales of furazolidone within the limitations period is irrelevant, for, they allege, Richardson's participation in the conspiracy was not restricted to Hess & Clark's sale of furazolidone but also took the form of maintenance of a "border watch" to prevent importation of the lower-priced Canadian product, even after the distributorship agreement had expired. The plaintiffs failed to raise this issue, which is not disclosed by the pleadings, in opposition to the defendants' motions for summary judgment, however. Instead, they stood by silently and submitted pro forma affidavits under Rule 56(f), which we will discuss presently. In view of the plaintiffs' inaction, the court properly entered summary judgment, *see, e.g., Saenz v. University Interscholastic League, supra*, 487 F.2d at 1028, unless their affidavits complied with Rule 56(f).

Following the district court's entry of summary judgment, however, the plaintiffs moved to amend or alter the judgment. In a memorandum supporting the motion they first advanced the above theory—*i.e.*, that Richardson had conspired with Norwich to violate the antitrust laws by monitoring the importation of furazolidone and reporting to Norwich instances of importation. They relied upon three statements appearing in the defendants' affidavits to substantiate the theory. The district court properly refused to modify summary judgment, however, for the statements were made prior to the limitations period and refer to activities prior to the limitations period. They in no way impair the court's determination

that Richardson's interest in furazolidone, not to mention its participation in its distribution, terminated prior to the limitations period. They do not constitute any evidence to support the proposition that Richardson conspired with Norwich within four years of June 7, 1974, the date of filing of the complaint.

C. Rule 56(f).

The district court correctly concluded, from a review of defendants' affidavits and from plaintiffs' tacit acceptance of the completeness and accuracy of those affidavits, that there existed no issue of material fact on the applicability of the statute of limitations. The court reasoned, with considerable justification, that there was no cause to delay summary judgment for the completion of discovery where the evidence bearing upon the applicability of the statute of limitations, the defense raised by the summary judgment motions, was nondiscoverable because already publicly available.

Nonetheless, the plaintiffs contend that by filing affidavits pursuant to Rule 56(f) they adequately demonstrated that entry of summary judgment prior to discovery would be premature. Each of these three affidavits reads as follows in its operative language:

> 2. At this time, plaintiff cannot present by affidavit facts essential to justify opposition to the motions of the defendants dated July 25, 1974.
>
> 3. Knowledge of such facts is exclusively with and/or largely under the control of the conspiratorial defendants.
>
> 4. Plaintiff has properly and timely commenced discovery designed to elicit such facts about conspiratorial activities with the filing of an extensive first set of Interrogatories served June 24, 1974.
>
> 5. Plaintiff is desirous of maintaining its discovery program of interrogatories, document inspection and depositions, which shall be conducted in prompt and orderly fashion to elicit facts from the alleged co-conspirators. [A: 431-32, 433-34, 435-36.]

Each affidavit is identical to the other except for the identity of the affiant.

We hold that the plaintiffs failed to establish any cause for postponement by the district court of a ruling on the motions for summary judgment. Plaintiffs made no effort to demonstrate what purpose, if any, discovery would accomplish, given the evidence proffered by the defendants on the absence of fraudulent concealment and the public character of the evidence supporting the applicability of the statute of limitations. While at the same time conceding that they knew of no evidence that would enable them to show the existence of a genuine issue of material fact, the plaintiffs made no attempt to identify what, if any, facts were within the defendants' exclusive control and how, if at all, discovery would assist them in bringing those facts to light. The court correctly concluded, under these circumstances, that discovery would have served no useful purpose whatsoever. *See United States v. Halpern*, 260 F.2d 590, 591 (3rd Cir. 1958).

Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is un-

justified. *See School Board of Okaloosa County v. Richardson, supra,* 332 F. Supp. at 1269; 6 J. Moore, *Federal Practice* ¶56.24 at 2876. *Compare Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016, 1018, 1022 (3rd Cir. 1942).

IV. *Conclusion.*

We agree with the appellants' general contention that summary judgment should be invoked sparingly in antitrust litigation. However, we reject the view that summary judgment is never appropriate in advance of discovery in an antitrust case. Rule 56 provides for no such exception. There may be cases where summary judgment is eminently appropriate even prior to discovery. This particularly true where, as in this case, the district court enters summary judgment on a ground not going to the merits of the action and the party opposing summary judgment fails to demonstrate any need for discovery. Thus, having correctly determined that discovery would have been futile, the district court properly entered summary judgment on the applicability of the statute of limitations.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
74-1893
September Term, 1974

WILLMAR POULTRY CO., et al.,
Appellants,

vs.

MORTON-NORWICH PRODUCTS, INC.,
RICHARDSON-MERRELL, INC., et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 7, 1975.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
No. 4-74-Civ. 276

WILLMAR POULTRY COMPANY, et al.,
Plaintiffs,

vs.

MORTON-NORWICH PRODUCTS, INC., et al.,
Defendants.

ORDER

In Paragraph 3 of its Order of October 1, 1974, the Court granted the motion of defendant Richardson-Merrill, Inc., for summary judgment and dismissed the action as to Richardson-Merrill. In Paragraph 2 of that Order, the Court granted the motion of defendant Morton-Norwich Products, Inc., for partial summary judgment. Plaintiffs now seek an amendment to the Order of October 1 reversing the grant of summary judgment and partial summary judgment or, alternatively, certifying Paragraphs 2 and 3 of that Order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Upon all the files, records, and proceedings herein,

IT IS ORDERED:

1. That the motion to delete Paragraphs 2 and 3 of the Order of October 1, 1974, is hereby denied.

2. That the Order of October 1, 1974, is hereby amended by addition of the following paragraph:

"5. That Paragraphs 2 and 3 above are hereby certified, pursuant to 28 U.S.C. § 1292(b), to involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation."

October 17, 1974.

EARL R. LARSON
United States District Judge

(Caption)

CLERK'S NOTICE UNDER RULE 77(D) F.R. CIV.PR. OR RULE 49(C) F.R. CIV.PR.

You are hereby notified that in the above-entitled cause, on the 1st Day of October, 1974 we filed Order of Judge Earl R. Lawson,

IT IS ORDERED:

1. That defendants' motion to strike is hereby granted.

2. That the motion for partial summary judgment of defendant Morton-Norwich Products, Inc., is hereby granted.

3. That the motion of defendant Richardson-Merrill, Inc., for summary judgment is hereby granted and that this action is hereby dismissed as to Richardson-Merrill, Inc.

4. That the motion of defendant Morton-Norwich Products, Inc., to stay discovery is hereby denied.

HARRY A. SIEBEN, Clerk
By . . . . . , Deputy

COCHRANE & BRESNAHAN
John A. Cochrane and
John E. Thomas
Suite 830, Minnesota Bldg.
St. Paul, Minn. 55101

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD AND
CONNELLY

Elmer B. Trousdale
W-1781 First National
Bank Building
St. Paul, Minn. 55101

(Caption)

ORDER

Defendants have moved to strike the claim of fraudulent concealment set forth in paragraph 24 of the complaint. Defendant Morton-Norwich Products, Inc., has moved for partial summary judgment as to all claims which accrued prior to the statutory period of limitations. Defendant Richardson-Merrill, Inc., has moved for summary judgment dismissing it from this action on grounds that all claims asserted against it are barred by the statute of limitations. Both defendants have moved to stay discovery pending determination of the above motions.

Oral argument was heard on September 18, 1974.

Upon all the files, records, and proceedings herein,

IT IS ORDERED:

1. That defendants' motion to strike is hereby granted.

2. That the motion for partial summary judgment of defendant Morton-Norwich Products, Inc., is hereby granted.

3. That the motion of defendant Richardson-Merrill, Inc., for summary judgment is hereby granted and that this action is hereby dismissed as to Richardson-Merrill, Inc.

4. That the motion of defendant Morton-Norwich Products, Inc., to stay discovery is hereby denied.

October 1, 1974.

EARL R. LARSON
United States District Judge

Memorandum Attached.

MEMORANDUM

Plaintiffs seek treble damages pursuant to 15 U.S.C. § 15 for violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The complaint alleges that defendant Morton-Norwich Products, Inc. (hereinafter "Norwich") holds a patent for the drug furazolidone; that Norwich entered into an agreement with the Hess and Clark Division of defendant Richardson-Merrell whereby Hess and Clark would be the exclusive distributor in the United States of furazolidone as a poultry feed additive; that from 1956 until at least 1973 defendants unlawfully conspired to prevent the important and resale within the United States of furazolidone produced or sold outside the United States; that plaintiffs were damaged by this monopolization and restraint of trade in that they paid substantially higher prices for furazolidone and feeds containing furazolidone than they would have paid if defendants had not illegally interfered in the furazolidone market. The first count of the complaint alleges that defendants engaged in the following five classes of activity to effectuate their monopoly on sales of furazolidone: (1) "caused the Customs Bureau and the President to prevent the importing of furazolidone manufactured and sold by Canadian Norwich and others into the United States"; (2) "refused and withheld its consent to all such importation"; (3) "made repetitive use of litigation which was timed and designed principally to preclude importation into the United States of competitive furazolidone manufactured by Canadian Norwich, among others, and thereby to preserve defendants' monopoly"; (4) "entered into agreements dividing markets by classes of customers"; (5) "imposed tying of sale of other products to furazolidone." The first count further alleges that defendants fraudulently concealed their unlawful combination so that plaintiffs by the

exercise of reasonable diligence could not have discovered the combination earlier than four years prior to the filing of the complaint. The second count alleges misuse of the furazolidone patent in violation of the Sherman Act.

Defendants have filed several motions raising the defense of limitations of actions and challenging plaintiffs' claim of fraudulent concealment. Defendants contend that the statute of limitations set forth in 15 U.S.C. § 15(b) bars any claims arising out of sales of furazolidone products which took place more than four years prior to commencement of this action (*i.e.*, before June 7, 1970). They maintain that the four year statute of limitations has not been tolled by fraudulent concealment of their activities. They have submitted affidavits and have pointed out documents of public record which they believe show that the five classes of activities alleged to be violations of the Sherman Act were known to plaintiffs, or could have been discovered by plaintiffs through reasonable diligence, prior to June 7, 1970.

Richardson-Merrill has moved to strike the allegation of fraudulent concealment in paragraph 24 of the complaint. It has also moved for summary judgment dismissing it from this action on grounds (1) that it made no sales of furazolidone to plaintiffs on or after June 7, 1970, and (2) that the statute of limitations bars claims based on sales made prior to that date. Norwich has moved to strike the allegation of fraudulent concealment and for partial summary judgment on limitations grounds as to all claims arising out of sales it made prior to June 7, 1970. Both defendants have moved for a stay on plaintiffs' discovery pending determination of these motions.

To toll the four year statute of limitations on grounds of fraudulent concealment plaintiffs must establish (1) concealment by the defendants of plaintiffs' cause of action, (2) lack

of knowledge by the plaintiffs of the existence of their cause of action, and (3) a reasonable probability that due diligence by the plaintiffs would not have discovered their cause of action within the four year statutory period. *Forbes v. Greater Minneapolis Area Board of Realtors*, No. 4-72-Civil 569 (D. Minn. 1973), at 2. Plaintiffs urge the Court to delay determination of the fraudulent concealment issue pending their discovery. However, discovery of defendants' records cannot establish fraudulent concealment if it can presently be shown that plaintiffs knew of their cause of action prior to June 7, 1970, or that plaintiffs could have discovered their cause of action within the statutory period through reasonable diligence.

It is a matter of public record[1] that Norwich filed a complaint with the United States Tariff Commission in March 1968 alleging unfair methods of competition in the importation and sale of furzolidone; that hearings on the complaint were held in September and October of 1968; that the United States Department of Justice raised before the Commission at that time questions of antitrust violations by Norwich through market division, tie-in arrangements, and patent misuse; that the Commission issued a final report and findings in November 1969 which expressly rejected the Justice Department charges. The final report of the Tariff Commission discloses all the classes of activities alleged in Count 1 of the complaint to have been the means by which defendants effectuated their monopoly of sales of furazolidone. The court concludes that by exercise of reasonable diligence plaintiffs

[1] Notice of Norwich's filing of the complaint appeared at 33 Fed. Reg. 5418 (1968); notice of the public hearing at 33 Fed. Reg. 11.192. 12,798-12,799; notice of the final report and findings at 34 Fed. Reg. 18,410 (1969). A full account of the Tariff Commission proceedings is set forth in the affidavit of Bradford S. Allen.

could have discovered their present cause of action by examining the Tariff Commission report issued in November 1969. Accordingly, the motion to strike the claim of fraudulent concealment must be granted.

At oral argument plaintiffs raised for the first time two additional grounds for tolling the statute of limitations. Since the Court finds both grounds unpersuasive, there is no prejudice to defendants in discussing them here. The first of these grounds is "inducement." Plaintiffs assert that numerous patent infringement suits brought by Norwich against importers of foreign furazolidone[2] "induced" plaintiffs and others similarly situated not to bring antitrust suits against defendants. "Duress" seems a more approriate description of this ground than "inducement." The Court acknowledges that under certain extreme circumstances duress might toll the statute of limitations. The Court agrees with the standards for duress in an antitrust action suggested in *Philco Corporation v. Radio Corporaton of America*, 186 F. Supp. 155, 162 (E.D. Pa. 1960):

> "Moreover duress, in order to toll the statute, must be the result of a threat to do an *unlawful* act. [citation omitted] . . . .
>
> "Although many 'possibilities' which Philco now alleges they then believed could have resulted had they brought suit against R.C.A. in 1946 may have placed some pressure upon them to refrain from suing, this in itself does not constitute legal duress which is necessary for *tolling* the statute. Indeed, it could not, particularly in this area

[2] One such suit was brought against plaintiff Peterson-Biddick Company in this Court. A consent judgment was entered barring Peterson-Biddick from importing foreign furazolidone. *Norwich Pharmacal Company v. Peterson-Biddick Company*, No. 4-67-Civ. 83 (D. Minn. 1967) (Judge Lord).

> of antitrust law where the possibility of financial loss through economic and competitive retalation faces almost any litigant who is unsuccessful in a private antitrust action—and indeed often faces even those who are successful. To recognize such anticipated loss as sufficient to toll the statute. of limitations, would in effect nullify the intent of Congress to place limitations upon suits of this type."

Here plaintiffs have alleged that the bringing of infringement suits constituted duress. The burden of defendant lawsuits cannot amount to duress unless the suits were brought in bad faith with harassment as their objective. Plaintiffs have made no showing of bad faith or harassment. To the contrary, in fifty-six such actions brought from 1963 to 1969 injunctions against the infringers were entered by consent in thirty-eight actions and in none of the actions was the validity of the Norwich patent successfully challenged.[3]

The second ground raised at oral argument for tolling the statute is directed to any combination or conspiracy terminated prior to the statutory period but which was a cause of injury within the statutory period. Plaintiffs argue that the statute should be tolled as to the party abandoning the conspiracy at least until that party takes affirmative action to nullify the continuing consequences of the conspiracy. Applied to the case at bar, this theory would defeat Richardson-Merrill's motion for summary judgment dismissing it from the action.

Though plaintiffs have not cited any authority favoring this theory, the Court finds some support for it in *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

[3] Allen affidavit, p. 3.

In *Zenith* some undetermined portion of the damages allowed was incurred within the four year period but was a proximate result of unlawful anti-competitive conduct occurring prior to the four year period. *Zenith* has been interpreted as allowing damages resulting from conduct prior to the statutory period only if at the time of the conduct the future damages were unascertainable. *Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F.2d 662, 667 (5th Cir. 1972); *Stewart Aviation Co. v. Piper Aircraft Corp.*, 372 F. Supp. 876, 877 (M.D. Pa. 1974). This Court is not prepared to expand further the *Zenith* exception to the 15 U.S.C. § 15(b) statute of limitations. It views the rationale of *Zenith* as limited to those exceptional circumstances in which significant future damages cannot be estimated at the time of the illegal conduct.[4] Such circumstances are not present in the case at bar and the statute will not be tolled.

Since plaintiffs' claim of fraudulent concealment and plaintiffs' other grounds for tolling the statute of limitations have been rejected, the 15 U.S.C. § 15(b) limitation must be applied. Claims based on sales to plaintiffs made before June 7, 1970, are barred. Norwich's motion for partial summary judgment as to all sales before June 7, 1970, will be granted. Richardson-Merrill has moved for summary judgment dismissing it from this action. In support of this motion, it has submitted the affidavit of Vincent E. DeFelice, former general counsel of Hess and Clark. DeFelice avers that the last sales of Hess and Clark's furazolidone product to plaintiffs were made in late 1969.[5] Plaintiffs have raised no objections to the

[4] In *Zenith*, damages for the illegal exclusion of counterclaimant Zenith's radios and televisions from several major foreign markets could accurately be estimated only by reference to Zenith's subsequent share of other competitive markets. 401 U.S. at 338-342.

[5] DeFelice states that November 14, 1969, was the date of the last sale to Willmar Poultry and that December 2, 1969, was the date of the last sale to Peterson-Biddick.

sufficiency of the affidavit, nor have they submitted affidavits or other documents disputing the dates of the last sales.[6] Accordingly, the Court finds that there is no genuine issue of material fact as to the dates of the last sales. Since there were no sales by the Hess and Clark Division of Richardson-Merrill on or after June 7, 1970, all claims against Richardson-Merrill are barred and summary judgment must be granted.

Finally, the motion to stay discovery pending determination of the other motions decided today is now moot and will, therefore, be denied.

EARL R. LARSON

APPENDIX D

(Caption)

MEMORANDUM ORDER FOR
ENTRY OF JUDGMENT

On October 1, 1974, this Court entered its Order in the above matter (hereafter "Suit 1"), *inter alia* granting defendant Richardson-Merrell, Inc.'s motion for summary judgment on the ground that all claims as to it were barred by the statute of limitations. The grounds upon which Richardson-Merrell was dismissed from this action were exhaustively canvassed by the Court of Appeals, which affirmed that dismissal on July 17, 1975. *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975).

On August 14, 1975, the plaintiffs herein filed a second action (hereafter "Suit 2"). Suit 2 seems to assert claims which

[6] The Court has examined the Customs' refusal notice submitted with counsel's letter of September 20, 1974, as well as the Huisinga, Tompt, and Peterson affidavits.

are identical to those in Suit 1. It may be that principles of *res judicata* should determine the outcome of Suit 2. For Suit 1 to be *res judicata* as to Suit 2, the dismissal of Richardson-Merrell, Inc., in Suit 1 must be a *final* judgment.

The Court is of the opinion that its Order dismissing Richardson-Merrell in Suit 1 is final. In its Order of October 1, 1974, the Court not only granted summary judgment but also ordered "that this action is hereby dismissed as to Richardson-Merrill [sic], Inc." The Clerk of this Court likewise notified counsel that Richardson-Merrell had been dismissed as a defendant. In their motion filed October 11, 1974, plaintiffs sought an Order "altering or amending the *Judgment entered herein* October 1, 1974." (Emphasis added.) In affirming this Court's Order, the Eighth Circuit repeatedly stated that it had been proper for this Court to *enter* summary judgment in favor of Richardson-Merrell. *Willmar Poultry Co. v. Morton-Norwich Products, Inc., supra.* The formal judgment of the Court of Appeals, Docket No. 32, stated that the *judgment* of this Court was affirmed. In Suit 2, all parties have proceeded as if the dismissal in Suit 1 was a final judgment.

Despite these rather overwhelming indicia that dismissal of Richardson-Merrell is final, the question of finality is not free from all doubt. *See,* Rule 54(b); 10 Wright & Miller, Federal Practice and Procedure: Civil §§ 2660, 2661; *Pennsylvania Turnpike Commission v. McGinnes,* 169 F. Supp. 580, 582-83 (E.D. Pa. 1958). The Court believes that the interests of justice would be served by removing any possible ambiguity as to whether the dismissal of Richardson-Merrell is a final judgment. The specific "determination" and "direction" mentioned in Rule 54(b) may be made "at any time." 10 Wright & Miller, *supra,* § 2660 at 89; *cf., Richardson v. Communications Workers of America, AFL-CIO,* 486 F.2d 801, 803 n.2 (8th Cir. 1973). The Court may act *sua sponte.* 10 Wright & Miller, *supra,* § 2660 at 86.

The Court hereby expressly determines "that there is no just reason for delay" in the entry of judgment herein against the plaintiffs and in favor of Richardson-Merrell, Inc., pursuant to Rule 54(b).

IT IS ORDERED:

That the Clerk of this Court is hereby expressly directed to enter judgment herein in favor of defendant Richardson-Merrell, Inc., and against the plaintiffs, dismissing defendant Richardson-Merrell, Inc., as a defendant in this lawsuit.

LET JUDGMENT BE ENTERED ACCORDINGLY.

December 18, 1975.

EARL R. LARSON
United States District Judge

APPENDIX E

STATUTES

Section 1, Sherman Act. (July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U.S. Code, Sec. 1.)

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 4, Clayton Act. (October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.)

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United

States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4B, Clayton Act. (July 7, 1955, Chap. 283, Sec. 1, 69 Stat. 283; 15 U.S. Code, Sec. 15b.)

Sec. 4B. Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

---

28 U.S.C. Section 1337:

Sec. 1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he can-

not for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX F

COUNT ONE

20. For many years, believed herein to commence April 17, 1956, and to continue up to at least the date of April 17, 1973, and thereafter, defendants have unlawfully attempted to monopolize and have unlawfully monopolized and unlawfully combined and conspired to restrain the above described interstate and foreign trade and commerce in the importation into and the sale within the United States of furazolidone, in violation of Sections 1 and 2 of the Sherman Act, by unlawfully excluding and preventing others from importing into and from reselling within the United States furazolidone manufactured and/or sold outside the United States by Canadian Norwich, among others.

21. Pursuant to and in effectuation of the aforesaid attempt to monopolize and monopolization and restraint of trade, defendants have done things which as alleged herein, they agreed and conspired to do, including among other things the following:

(a) caused the Customs Bureau and the President to prevent the importing of furazolidone manufactured and sold by Canadian Norwich and others into the United States;

(b) refused and withheld its consent to all such importation;

(c) made repetitive use of litigation which was timed and designed principally to preclude importation into the United States of competitive furazolidone manufactured by Canadian Norwich, among others, and thereby to preserve defendants' monopoly;

(d) entered into agreements dividing markets by classes of customers;

(e) imposed tying of sale of other products to furazolidone.

EFFECTS

22. The purpose, intent and necessary effect of the aforesaid attempt to monopolize, monopolization and restraint of trade have been that:

(a) furazolidone manufactured and sold by Canadian Norwich and others has been excluded from importation into and sale within the United States;

(b) furazolidone prices have been maintained in the United States at levels substantially higher than those which prevail in foreign countries;

(c) non-competitive prices have been maintained;

(d) plaintiffs and the members of the class herein have been deprived of the opportunity to purchase furazolidone at competitive prices from suppliers of their choice.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-74-276
F.R.C.P. 56 (f)

WILLMAR POULTRY COMPANY, et al.,
Plaintiffs,

vs.

MORTON-NORWICH PRODUCTS, INC., et al.,
Defendants.

AFFIDAVIT

State of Minnesota
County of Kandiyohi—ss.

THEODORE HUISINGA, being sworn, says:

1. I am a vice president of Willmar Poultry Company, one of the plaintiffs in the above-captioned action.

2. At this time, plaintiff cannot present by affidavit facts essential to justify opposition to the motions of the defendants dated July 25, 1974.

3. Knowledge of such facts is exclusively with and/or largely under the control of the conspiratorial defendants.

4. Plaintiff has promptly and timely commenced discovery designed to elicit such facts about conspiratorial activities with the filing of an extensive first set of Interrogatories served June 24, 1974.

5. Plaintiff is desirous of maintaining its discovery program of interrogatories, document inspection and depositions,

which shall be conducted in prompt and orderly fashion to elicit facts from the alleged co-conspirators.

6. This affidavit is exclusive of facts already in the record herein which plaintiff believes sufficient to defeat said motions.

THEODORE HUISINGA

Subscribed and sworn to before me this 13th day of September, 1974. — Elverd L. Hauge, Notary Public, Kandiyohi County, Minnesota. My commission expires June 7, 1980.